United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To Be Argued By:
Paul V. French

Docket No. 75-2120

IN THE

United States Court of Appeals

For the Second Circuit

BARTHELMIO DALLI and THOMAS PYTEL,

Petitioners-Appellants,

— v. —

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal From The United States District Court For The Northern District of New York

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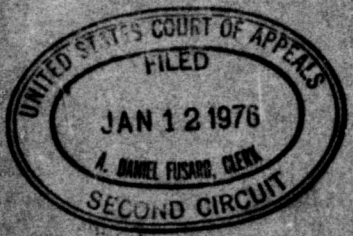
BRIEF FOR APPELLEE



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STATEMENT OF THE ISSUES

Denial of post-conviction relief after an evidentiary hearing was not error in view of appellants' failure to produce any newly discovered evidence.

STATEMENT OF THE CASE

Procedural Background

BARTHELMIO DALLI and THOMAS PYTEL appeal from an order of the United States District Court for the Northern District of New York (MacMahon, D.J.), entered June 13, 1975, denying after a hearing a petition for post-conviction relief pursuant to Title 28, U.S.C., Section 2255 (74-CV-114).

The appellants DALLI and PYTEL were indicted in 1968, along with Stanley Simmons and Claude Bourdeau (68-CR-163) in the United States District Court for the Northern District of New York for violations of the narcotics laws. On May 26, 1969, DALLI and PYTEL were convicted, after a jury trial, of selling, receiving and concealing heroin in violation of Title 21, U.S.C., Sections 173 and 174, and conspiracy to commit the substantive offense in violation of Title 21, U.S.C., Section 173. On June 13, 1969, appellants were sentenced to twenty years in prison on each count, the sentences to run concurrently.

The judgment of conviction was affirmed by this court, United States v. Dalli, 424 F.2d 45 (2d Cir., 1970), and the Supreme Court denied certiorari. 400 U.S. 821 (1970).

By petition, dated November 10, 1972, the appellants sought a hearing pursuant to Title 28, U.S.C., Section 2255 which was denied without a hearing and affirmed by this court. Dalli v. United States, 491 F.2d 758 (2d Cir., January 14, 1974).

By petition, filed March 18, 1974, the appellants sought a hearing pursuant to Title 28, U.S.C., Section 2255 which was consented to by the Government and subsequently denied after hearing in an opinion which is reproduced in appellants' appendix (App. B).

ARGUMENT

POINT I

DENIAL OF POST-CONVICTION RELIEF AFTER AN EVIDENTIARY HEARING WAS NOT ERROR IN VIEW OF APPELLANTS' FAILURE TO PRODUCE ANY NEWLY DISCOVERED EVIDENCE.

It is the Government's contention that since this Court has already reviewed the original DALLI petition and affirmed the denial of an evidentiary hearing based on that petition that this instant petition and hearing must be reviewed in light of this Court's decision in Dalli v. United States, 491 F.2d 758 (2d Cir., January 14, 1974). The primary basis for the relief requested by petitioner DALLI in his original petition was an affidavit of ex-Lieutenant Charles Cassino (Docket Entry (1) - Petitioners' Exhibit 3). That affidavit has been thoroughly reviewed by this Court and was determined to be grossly insufficient on its face.

The Dalli v. United States decision, supra, and the opinion therein is now the law of this case and the Government contends that it should guide the Court in its decision upon this appeal. The Court stated as follows in that case:

> "Furthermore, where the petitioner has already had a full evidentiary hearing upon the same claim and seeks another hearing on grounds of newly discovered evidence, greater specificity is required than if no hearing had been held, in order to avoid relitigation of issues on the basis of proof already deemed insufficient."
>
> "With the obvious deficiencies of the Cassino affidavit viewed against the files and records of the case and in light of the fact that petitioner had already had one hearing on substantially the

same claim the trial court did not err in denying the petition without a hearing."

Subsequent to the opinion in Dalli v. United States, supra, the appellants attempted in light of the statement in Dalli v. United States, supra, to wit:

> "Even if Cassino is correct in his belief that a tap was initiated on Dalli's home telephone, Cassino is not in a position to aver, and nowhere in his affidavit does he attempt to aver as a matter of personal knowledge that any information from a state wiretap was passed to federal agents."

to correct this fatal defect in his original petition.

The appellants then submitted a new petition seeking to show as newly discovered evidence three main allegations to support their contention. First, a new one page affidavit by Cassino (Docket Entry (1) - Petitioners' Exhibit 4) which is equally "marbled in hearsay" as the original affidavit and in and of itself would be insufficient to form a basis for an evidentiary hearing in the instant case. In other words, it was an attempt on the part of the petitioners to circumvent the decision of the Second Circuit in Dalli v. United States, supra.

The second allegation of newly discovered evidence is the two affidavits of Dennis J. Hart a former Federal BNDD Agent who participated in part in the Government's investigation of petitioners. (Docket Entry (1) - Petitioners' Exhibits 5 & 6). The first affidavit of Hart contains the following statement:

> "After being told about the wiretap, it was daily routine for myself and other agents to ask Agent Halpin and/or O'Brien about what was learned from the taps the previous day or evening."

Such a statement in an affidavit would lead anyone to believe that the affiant was receiving information from the state wire taps. It was primarily because of that sworn statement by a former federal agent that the Government consented to the evidentiary hearing in the instant case. That coupled with the second affidavit of Cassino which contain the following wording:

> "It is my personal recollection that during the critical, closing days of this investigation, several telephones, other than those located at the Beauty Trail were wiretapped by the New York State Police to obtain information concerning the anticipated movements of the suspects."

became the gist of the petitioners' case.

The third significant allegation offered as newly discovered evidence is the petitioner DALLI's own sworn statement as follows:

> "Your petitioner states that on the evening of September 9, 1968, he called co-defendants Pytel and Simmons, from a phone booth in front of his residence, to make arrangements to meet upstate the next day. On information and belief, it was the interception of these phone calls made by the petitioner by illegal wiretapping that resulted in his arrest the next day and the discovery of evidence used against him at the trial." (Paragraph 7 of petition--Docket Entry (1))

With this sworn information before the Court the Government logically anticipated proof in support thereof. It is assumed that the Court also anticipated such proof for it brought to the hearing not only the petitioner DALLI but also the defendant PYTEL which the Court made a petitioner for the purpose of the hearing and the other co-defendant Simmons as a prospective witness for the petitioners. Each of the

aforesaid were at the time serving substantial sentences in maximum security federal correctional institutions.

All of the tapes, transcripts and supporting papers therefor were again made available to the petitioners and their attorneys that originally had been furnished at the 1969 pre-trial electronic surveillance hearing. After some ten days of in-court testimony and out of court listening to voluminous tapes, what do the petitioners prove? At no time does the petitioner DALLI take the stand and testify as to any such phone calls as indicated in paragraph 7 of his petition; at no time does petitioner PYTEL take the stand and state that he received such a phone call from DALLI and at no time does witness Simmons take the stand and testify that he received such a phone call from DALLI.

The petitioners then produce the original records that resulted in the wire taps of the New York State Police (the Beauty Trail taps, the Ronnie Carr taps, and the Palmento taps) all of which were produced to his former counsel at the original 1969 hearing with the exception of the Palmento tapes since they were never subpoenaed by petitioner's attorney for presentation at that time. Many days were spent listening to the testimony of Investigator Rock who signed the affidavit in support of the aforesaid wire taps and now Judge, and then District Attorney, Ingrassia, who sought the wire taps, none of which is either newly discovered evidence or does any of it support the contention that the federal agents were receiving information from said wire taps. At best, these witnesses established the legality of the New York State Police wire taps which directly refutes the first and second affidavits of Cassino as to the alleged numerous wire taps, and also the petitioner DALLI's contention as to the existence of illegal taps.

We now come to the testimony at the hearing of ex-Agent Hart which, based on his affidavit would lead one to believe that he and other federal agents were receiving daily information from the New York State Police wire taps and thus tainted the Government's case. The Government contends that Hart's testimony throughout and in particularly at page 203 of the transcript herein completely negates this contention:

(referring to O'Brien)

Q Did he say to you, "I heard yesterday on the wiretap that tomorrow you have to go to the Bronx because something is going to move from there?"

A No, sir.

Q Did he ever give you any information that you have to go to the Bronx because I heard from the wiretap?

A No, sir.

Q So it is a fair statement to say that you never got any information from the wiretap?

A Yes, sir.

Q And even though you met daily from August 21, to October 10, 1968; isn't that so?

A I never got any information.

The Government further argues that in view of all of the foregoing and at this stage of the hearing there is no basis whatsoever to establish the allegations as set forth in the petition. Thus, there remains the testimony of Cassino to sustain petitioners' burden. The thrust of the petition herein being that they are able to show through Hart and Cassino that the information from the New York State Police wire taps was related to the federal agents so as to taint the Government's case.

The Government contends that no such proof was elicited from Cassino but, on the contrary, Cassino's testimony throughout supports the Circuit Court's analysis of the deficiencies of his affidavit which the Court aptly described as follows:

> "When it comes to the key 'newly discovered' evidence offered to support the renewed claim that the federal arrest and seizure was tainted by the state wiretap Cassino's averments are not only vague, indefinite and conclusory but marbled with hearsay."

For example, the Government points to the testimony of Cassino that he knew little or nothing about the existing wire taps; that he had nothing to do with obtaining them; that he only believed that there was more than one (TR., page 311); that he did not know where the wire taps were located; that he had no recollection of ever listening to any wire taps (TR., page 312); that he didn't know whether Kaynor gave O'Brien any testimony from the wire taps (TR., page 324 to 328); that he didn't know of any information of any wire taps being passed to the federal authorities (TR., page 327); that his testimony is replete with hearsay (TR., page 356); that O'Brien, referring to an alleged conversation in February of 1972, did not tell Cassino he knew of any information from the wire taps (TR., page 362).

After reviewing the original testimony of Cassino, his two affidavits and his testimony at this hearing, one can reach no other conclusion than this man is, at best, a pathetically confused and used man.

The further contention by petitioners to establish their petition by the offer in evidence of the congratulatory letters between federal and state agencies (Docket Entry (1) - Petitioners' Exhibits 14 & 15) as affirmative proof of taint to the Government's case

is equally without merit. There is no question that the federal authorities were assisted in spanning some 350 miles of roadway on September 10, 1968, and in the arrest of petitioners. The Court may take judicial notice of the fact that letters of such type are constantly passed from police agency to police agency in order to maintain a cooperative liason between all law enforcement agencies.

In addition to the foregoing the Government calls to the Court's attention that it had made available to the hearing in Auburn all of the agents, both state and federal, who were in any way connected with the case or referred to in the petition and its supporting papers. Throughout the hearing and at considerable expense to the Government the following were present or immediately available:

U.S. Government - DEA Agents (Former BNDD Agents)

Agent Halpin from Chicago, Illinois
Agent Johnson from Bonn, Germany
Agent Finnerty from Paris, France
Agent Rivera from Paraguay, South America
Agent O'Neil from New York City
Agent Maltz from New York City
Agent Moser from New York City
Former Agent O'Brien from New Jersey (who returned from Ireland having been excused by the Court to visit a dying Aunt)

New York State Police

Superintendent Kirwin from Albany
Chief Counsel Bolton from Albany
Retired Major Mermell from Monticello
Investigator Rock from New York City
Investigator Kaynor from New York City
Investigator Smith from New York City

All of the above could have been called by the petitioners in an attempt to sustain their burden of proof. None of the above were called to the stand by the petitioners with the exception of calling Superintendent Kirwin and Agent O'Neil relative to the congratulatory letters. Thus, it may be inferred that they could add nothing affirmative in support of their petition.

The Government relates the above facts with respect to the availability of the witnesses not so much as a position of law but to indicate to the Court that no further purpose would be served by any further proceedings in this case. The Government respectfully submits that the Court can now put the case to rest and should deny the petition and enforce the finality of its judgment.

CONCLUSION

THE DENIAL OF THE PETITION FOR POST-CONVICTION RELIEF SHOULD BE SUSTAINED.

Respectfully submitted,

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Re: Barthelmio Dalli and Thomas Pytel v. United States of America

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Dear Sir:

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[25] Briefs

[XX]XXXXXXXXXXXXXXXXXXXXXXXXXX

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FOR Everett J. Rea

cc: James M. Sullivan, Jr.
United States Attorney

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Attorney(~~s~~) for **Appellee,**

☒ he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

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cc: **James M. Sullivan, Jr.**
United States Attorney